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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-651

ALVIN H. BERNDT, ROBERT S. DRISCOLL AND LORD, ABBETT & CO.,

Petitioners,

v.

PAULETTE PAPILSKY,

Respondent.

BRIEF FOR RESPONDENT PAULETTE PAPILSKY IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 333 F. Supp. 1084. The opinion of the Court of Appeals for the Second Circuit has not yet been reported.

Jurisdiction

The jurisdictional requisites are set forth in the Petition.

Question Presented

Where a stockholders' derivative case is dismissed because plaintiffs' lawyers wilfully failed to answer inter-

rogatories and did not "adequately represent the interests of the shareholders" (FRCP 23.1), is such a dismissal binding on the corporation and all its other shareholders where notice of the dismissal pursuant to Rule 23.1 was not given?

Statutes Involved

This case involves FRCP 23.1, 37 and 41(b).

Statement of the Case

Plaintiff, a shareholder of Affiliated Fund, Inc. (the "Fund") a mutual fund, brings this derivative action on the Fund's behalf against its directors, investment adviser and principal underwriter. In short, she claims that the Fund's investment adviser improperly deflected the brokerage commissions granted by the Fund's portfolio transactions to the benefit of the investment adviser. (This practice is known in the industry as "reciprocals" and "give-ups") (A-14). The Court of Appeals noted that similar "give-up" claims were held by the First Circuit to constitute "violations of the Investment Company Act of 1940" (A-16, fn. 3). Applying the First Circuit principles to the present case, the Fund here would be entitled to a recovery of many millions of dollars.

Before plaintiff could proceed with discovery, defendants moved to dismiss her complaint on the claim of *res judicata*. The basis of defendants' motion was: A similar derivative complaint, *White* v. *Driscoll*, 67 Civ. 98 (hereafter "*White*"), on behalf of the Fund, brought by another (and wholly unrelated) stockholder, had been dismissed because plaintiffs' lawyers there were held to be "not serious in prosecuting this action" (A-16).

The District Court (per Wyatt, *J.*, who had previously dismissed *White*) denied defendants' summary judgment motion. The Court of Appeals for the Second Circuit unanimously affirmed Judge Wyatt's decision.

Defendants now seek a writ of certiorari.

Statement of Facts

White was commenced in January 1967. During the four years of its pendency, plaintiffs' attorneys took no depositions and served no interrogatories on defendants, although the facts were peculiarly in the possession of defendants.

Approximately a year and one-half after its commencement, defendants served interrogatories upon White. When, by January 14, 1969 (approximately three months later), plaintiffs had not yet answered defendants' interrogatories Judge Wyatt entered an order directing the *White* plaintiffs to answer by February 15, 1969. On February 15 the *White* plaintiffs requested and received an extension of time to answer to March 4, 1969. On March 31, 1969, over four weeks late, the *White* plaintiffs finally mailed "purported answers" to the interrogatories. These answers, in addition to being unresponsive, were unsigned and unverified. Because of these defects they were returned by defendants (A-15). Thereafter the *White* plaintiffs sat on their interrogatories for 18 months, and only then, waking from their lethargy, served answers which were held to be "totally inadequate" (A-16).

The *White* defendants then moved, pursuant to FRCP 37(b)(2)(C) to dismiss *White* on the ground that plaintiffs had failed to answer the interrogatories as required by Judge Wyatt's order of January 14, 1969 (A-15). Judge

Wyatt referred the motion to a special master. "The Master concluded that plaintiffs' long delayed answers to the interrogatories were 'totally inadequate' and 'that [t]he deficiency of the answers to interrogatories and the delay in serving them demonstrates that plaintiffs are *not serious* in prosecuting the action.'" (A-15-16; emphasis added).

On March 16, 1971, Judge Wyatt adopted the special master's recommendation and entered an order dismissing the action as to all defendants served, other than the nominal defendant, the Fund (A-16).

The judgment ran only against the *White* plaintiffs. Judgment was not entered in favor of the moving defendants against the Fund; that claim was severed pursuant to FRCP 54(b) (A-16). Thereafter this action was commenced.

On June 12, 1971 judgment was entered by Chief Judge Sugarman dismissing the Fund's claim, however, "*without prejudice*" (A-16).

Neither dismissal was accompanied by notice (FRCP 23.1) to the Fund's other shareholders (A-16).

The District Court's Opinion

The District Court denied defendants' plea of *res judicata*. Judge Wyatt held that *White's* standing to sue in the right of the Fund, was, indeed, determined against him on the merits. They were forever barred. The dismissal was based on the personal disability of *White*. At no time, was the right of the Fund to recover against its fiduciaries ever adjudicated, or even brought into issue. Judge Wyatt therefore concluded that his dismissal of *White* did not bar this action (A-11).

The Court of Appeals Opinion

The Second Circuit unanimously affirmed. In its affirmance, it additionally ruled that, since the corporate claim was never litigated, FRCP 23.1 required notice to the shareholders before the judgment could be pleaded in bar. The Court noted, prophylactically, that evasion of the Rule 23.1 notice requirements could too easily lend itself to a collusive bargain that might immunize alleged wrongdoers.

The Court of Appeals concluded:

> "***[O]n balance, we believe that dismissals of derivative suits for failure to answer interrogatories are more analogous to voluntary dismissals. Thus, if prior dismissals for failure to comply with discovery orders are to be given res judicata effect, notice of the proposed dismissal must be given to nonparty stockholders.
>
> The policy considerations which compel the giving of notice prior to voluntary dismissals are equally applicable to dismissals for failure to answer interrogatories. Similar to the reasons for extending the notice provisions of Rule 23.1 to a dismissal following consent to the entry of summary judgment, a dismissal for failure to answer interrogatories could easily disguise a collusive settlement. To permit dismissal without notice for failure to comply with a discovery order would provide a simple technique whereby fraudulent directors or officers could avoid future liability by having a complaint stockholder sue and withdraw at an appropriate moment." (A-26, 27; footnote omitted.)

Turning to the question of whether *White's* counsel complied with the requirement of Rule 23.1 that, they "fairly

and adequately represent the interests of the shareholders", the Court of Appeals stated:*

> "The rationale for binding nonparty stockholders to a judgment in a derivative action is that a plaintiff-stockholder represented their interests in that litigation. If nonparty stockholders are to be conclusively bound by the results of an action prosecuted by a stockholder ostensibly representing their interests, however, fundamental considerations of fairness and justice demand that the representation be adequate. Cf. *Hansberry* v. *Lee*, 311 U.S. 32, 44-46 (1940). One of the principal criteria for adequacy of representation is that the representation must be of such character as to insure the vigorous prosecution of the claim."
>
> * * * * *
>
> "The fact that the *White* action was dismissed for failure to answer interrogatories raises some doubt as to whether the *White* plaintiffs provided the type of representation necessary to satisfy the dictates of due process. The uncertainty about the adequacy of the representation is increased somewhat by the Special Master's conclusion that the *White* plaintiffs were 'not serious in prosecuting this action . . .' and by the First Circuit's decision in *Moses* v. *Burgin*, *supra*, note 3, which held that claims similar to those asserted in the *White* action could constitute violations of the Investment Company Act of 1940." (A-28, 29)

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* The requirement of adequacy of representation is a prerequisite to a binding judgment. *Hansberry* v. *Lee*, 311 U.S. 32 (1940), infra, p. 15-16.

POINT I

The judgment in *White* bars only the *White* plaintiffs, but not the Fund and its other stockholders.

Petitioners thus state the keystone of their argument: Dismissal of *White* was a "dismissal going to the merits" (Pet. Br. p. 8.) Merits of what? The District Court and Court of Appeals both agreed that the dismissal was indeed on the merits—*but solely against the White plaintiffs. White* was forever barred from picking up the cudgels for the Fund and its shareholders.

Not so, however, the lower Courts held, the Fund or its other shareholders. The Fund's case never reached the merits, nor indeed did it come within hailing distance of it. Not only was there no trial, but there were not even a single deposition or interrogatory conducted or issued by *White* during the four years that *White* was pending. And adding insult to apathy, when White's counsel were roused from their slumber by the service on them of defendants' interrogatories, White's counsel first ignored, then flouted, finally made a mockery of the District Court's order requiring responses. In these circumstances, defendants nonetheless contend that the claim of the Fund against its fiduciaries was dismissed on the merits—despite the fact that no notice was given to the shareholders.

In the face of these facts, defendants nonetheless contend that the dismissal of the corporation *must* be presumed to be on the merits, or with prejudice. They purport to find support for their contention in FRCP 41(b). It provides:

> "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision * * * operates as an adjudication upon the merits."

We agree that the *White* judgment was "on the merits" by virtue of Rule 41(b). That proposition, however, merely poses the question; it does not answer it.

In an ordinary action—as distinguished from a class of derivative suit—a dismissal on the merits is, indeed, the end of the controversy. The plaintiff, as the sole owner of the claim in litigation, is forever barred from bringing another action on the same claim.

By contrast, a dismissal of a *derivative* suit on the merits raises the question: What are the merits that are determined and foreclosed? If, for instance, the plaintiff turns out not to be a stockholder at all, his action will be dismissed "on the merits", but that dismissal will preclude only the particular plaintiff from bringing another action in the corporate right. The corporation and its other stockholders are obviously not precluded by such a dismissal, even though it is denominated "on the merits".

The same is true in many other cases. The plaintiff may not have been a shareholder at the time of the wrong. He may have failed to exhaust his intracorporate remedies by making or excusing a demand on the board of directors or the other stockholders. He may have individually ratified the wrong complained of. He may be individually guilty of laches. In all these cases, the derivative suit will be dismissed on the merits, but the dismissal will bar only the particular plaintiff; it will not bar the corporation or its other stockholders.

On the other hand, a derivative action may be dismissed on the merits because the corporate claim asserted by the plaintiff is not supportable. In such case, the dismissal on

the merits will bar not only the stockholder plaintiff, but also the corporation and its other stockholders.

Here, the Courts below held that the bar of the dismissal applied only to the *White* plaintiffs. Certainly there is nothing in Rule 41(b) to indicate that a dismissal for disobedience to a court order should operate not only against the guilty party, but also against the corporation and its other shareholders, who are wholly innocent of any procedural misconduct.

Judge Wyatt agreed with this analysis of Rule 41(b):

> "The decision on the present motion is not that Rule 41(b) does not apply. On the contrary, Rule 41(b) does apply and its application bars the claim which belonged to the White plaintiffs. Rule 41(b), however, does not require that the claim be barred which belonged to Fund." (A-11)

Defendants claim that they were put to the burden of preparing their defense to the *White* action; that action, having been dismissed, defendants contend that they should not be burdened with a second litigation. Defendants did not, however, present that argument to Judge Wyatt when he rendered his decision in the *White* case. Had defendants wished to secure protection against an action by the Fund or other stockholders, they could have asked Judge Wyatt to give notice of the proposed dismissal to the Fund's stockholders at large. In that event, defendants would have run the risk that some other stockholder might have intervened in the *White* action and carried it forward. Defendants avoided that risk, intentionally or otherwise. They cannot now complain that another stockholder of the Fund takes up the litigation. Since, indeed, the present action was com-

menced only one month after the dismissal of *White*, defendants' trial preparation will not be wasted but can be used for the purpose of their defense to the present suit.

Moreover, had defendants really sought a judgment on the merits in *White*, they could have requested Judge Wyatt to make factual findings pursuant to FRCP 37(b) (2) (A). Had Judge Wyatt made such findings and found the claims in *White* to be untenable, the defendants might have obtained a binding judgment. *Mangano* v. *American Radiator etc. Corp.*, 438 F. 2d 1187 (3rd Cir. 1971), affirming 50 FRD 13 (E.D. Pa. 1970).* No such findings were made either by the Special Master or Judge Wyatt. Indeed, the grounds for dismissing *White:* lack of seriousness in prosecuting the action and inadequate answers to interrogatories, clearly demonstrate that the dismissal was not intended to be on the merits.

The authorities cited by petitioners are wholly inapposite. *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958), and *Costello* v. *United States*, 365 U.S. 265 (1961), were actions brought in the individual right of plaintiff. They have no bearing on the question *sub judice.* In *Dougherty* v. *Ball*, 43 FRD 329, 336 (C.D. Calif., 1967), the issue raised by the complaint was held to be moot. Accordingly, notice would have been meaningless; it was so held.

In *Ratner* v. *Paramount Pictures*, 6 F.R.D. 618, 619 (S.D.N.Y., 1942), the prior case had been "tried on the merits", so, of course, the defense of *res judicata* was upheld when an identical suit was later instituted. And *Max-*

* While it does not appear from the reported opinions that *Mangano* was a class action, the record reflects that it was brought as a class action.

saro v. *Fisk Rubber Corporation*, 36 F. Supp. 382, 386 (D. Mass., 1941) affords petitioners no greater comfort. The District Court held that the complaint did not state a cause of action. Notice therefore would have been a futility.

POINT II

Assuming, *arguendo*, that the *White* judgment must be presumed to be with prejudice, nonetheless, absent any adjudication of the merits of the cause of action, notice to the non-party shareholders was required to bar them.

The Court of Appeals, in affirming Judge Wyatt, held that, even if *arguendo* dismissal of *White* was "on the merits," nonetheless defendants' failure to give notice to non-party stockholders of the dismissal barred them from asserting that the judgment was *res judicata* here.

FRCP 23.1 provides that there shall be no dismissal of a derivative action unless "notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

Where notice is prescribed as a precondition to the dismissal of an action, such notice is a prerequisite to *res judicata*. *Smith* v. *Alleghany Corp.*, 394 F.2d 381, 391 (2nd Cir. 1968), cert. den. 393 U.S. 939; *Stella* v. *Kaiser*, 218 F.2d 64, 65 (2nd Cir. 1954), cert. den. 350 U S 835 (1955); *Winkelman* v. *General Motors Corp.*, 39 F. Supp. 826, 831 (SDNY 1940).*

* In analogous situations where class or derivative actions were dismissed without notice, courts have refused to grant "with prejudice" dismissals. LAURENZANO v. TEXACO, INC., CCH Fed. Sec. L. Rep. ¶ 92,950 (SDNY 1971); *Dolgow* v. *Anderson*, 53 FRD 664, 690 (EDNY 1971).

It has been held that notice of dismissal must be given whenever the dismissal is voluntary in nature. For example, in instances where a plaintiff stockholder in a derivative action does not oppose a summary judgment motion, notice is required before that judgment may be deemed *res judicata* in another action. *Certain-Teed Products Corp.* v. *Topping*, 171 F. 2d 241, 243 (2nd Cir. 1948); *Winkelman* v. *General Motors Corp.*, *supra*, 39 F. Supp. at 830-31. Moreover, even in those instances where an action may be dismissed over the opposition of plaintiffs' counsel, e.g. a dismissal for want of prosecution, notice is required. *Webster-Eisenlohr* v. *Kalodner*, 145 F. 2d 316, 320 (3rd Cir. 1944) 5 Moore's Fed. Prac. ¶ 41.11[2] at p. 1,116.

One of the reasons that a dismissal of a derivative action, other than after an adjudication of the issues on the merits, must be accompanied by notice is to forestall the possibility of collusive dismissals and to "provide against such adverse effect when a plaintiff who starts an action becomes faint-hearted before its completion . . ." *Webster-Eisenlohr* v. *Kalodner*, *supra*, at p. 320; *Marcus* v. *Textile Banking Co.*, 38 FRD 185, 187 (SDNY 1965); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L. J. 421, 428 (1936). Notice enables any member of the class or stockholder of the Corporation to pick up the cudgels for the class or corporation whenever the self-appointed representative of the class, whether out of sheer tiredness, inertia or worse decides to drop the case. *Webster-Eisenlohr* v. *Kalodner*, *supra* 145 F. 2d at p. 320; *Rothman* v. *Gould*, 52 FRD 494 (SDNY 1971); *Yaffe* v. *Detroit Steel Corp.*, 50 FRD 481, 483 (N.D. Ill. 1970).

The Court of Appeals properly concluded that the dismissal in *White* was more analogous to a voluntary dismissal than a dismissal on the merits (A-26, 27). It found that while the dismissal in *White* had some of the attributes of a dismissal on the merits (i.e., plaintiffs contested dismissal), on balance notice was required. Defendants refer to the dismissal of *White* as "a contested adjudication". (Pet.'s Br., p. 14.) The contention is strange. The fact is that *White* was dismissed precisely because of the failure of its counsel to contest or to litigate. Contesting dismissal, after the facts giving rise to it make the dismissal inevitable, is more ceremonial than real. It is as if plaintiff, having no standing to sue whatever, strenuously (but futilely) "contests" defendants' effort to dismiss.

The Court of Appeals noted that there were significant public policy considerations which compel the giving of notice in situations where plaintiff is dismissed for failure to comply with a discovery order. Most important is the inherent possibility that such a device could be used to "disguise a collusive settlement" (A-27). Rule 23.1 is rooted in prophylaxis; the contention that the Court must make a finding of collusion before invoking the Rule misreads both its language and intent.

Petitioners plead *ad misericordiam* that the expenses and bother of notice would place an unfair burden on them and be troublesome to the Courts. They cite recent discussions only with respect to notice in *class* actions—a much more troublesome area for giving notice. (Pet. Br. 8-9). The derivative action notice is a simple, uncomplicated process; the shareholders of the corporation are easily identified. Some of the notices in mutual fund cases

were simply inserted in the envelopes bearing the periodic dividend checks.

The Court of Appeals was at pains to limit its holding as to notice to "a stockholder's derivative suit" (A-21).

Moreover, whatever the cost of notice may have been it would have been a small price for defendants to pay for achieving a *res judicata* bar to this $6 million claim.* But, the fact is petitioners never even sought to raise the issue of notice with Judge Wyatt.

Defendants pounce upon the statement of the Court of Appeals that its decision in this case "carves out an exception to the general principles of Rule 41(b) for derivative suits dismissed for failure to answer interrogatories". (Pet. Br., p. 12). Defendants construe this as an amendment of the Rule of this Court by the Court of Appeals—and add the gratuitous admonition to the Court of Appeals that:

> "Only this Court may amend (its) Rules. . . ." (Pet. Br., p. 12; interpolation added)

Needless to say the Court of Appeals did no such thing. The quotation lifted from its context goes on to say that it was interpretive of existing law. "In short, our decision today makes no new departure in the law". (A-22)

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* For example, in *Berland* v. *Mack*, 48 FRD 121, 131 (SDNY 1969), Judge Mansfield charged the defendants with the cost of notice because such notice affords defendants the protection of *res judicata*.

POINT III

The inadequacy of *White's* counsel in their prosecution of the action also precludes giving the judgment binding force against the class.

The Court of Appeals held that, if nonparty stockholders are to be bound by a judgment of dismissal, representation of the self-chosen plaintiff must be adequate. The Court concluded that:

> "One of the principal criteria for adequacy of representation is that the representation must be of such character as to insure the vigorous prosecution of the claim. (Citing cases). As the court said in *Mersay* v. *First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.D.N.Y. 1968) (class action):
>
> > '[T]he primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process.'" (A-28)

FRCP 23.1 requires that the plaintiff in a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated." Adequate representation is more than a procedural nicety; the authorities are unanimous in holding that it is a prerequisite to a binding judgment: *Hansberry* v. *Lee*, 311 U.S. 32 (1940)—a class action; *Smith* v. *Alleghany Corp.*, 394 F. 2d 381, 391 (2nd Cir. 1968), cert. den. 393 U.S. 939—a derivative action; and *Stella* v. *Kaiser*, 218 F.2d 64, 65 (2nd Cir. 1954), cert. den. 350 U.S. 835 (1955)—also a derivative action.

The manifest purpose of this requirement is to provide against the danger inherent in permitting *any* member of a class to arrogate to himself the championship of the rights of absentee members—without having the required ability, zeal or seriousness of purpose. The sole protection of the class members against such inadequate representation is to require that the self-appointed champion "adequately represent the interests of the shareholders."

Plaintiffs' counsel in *White* ignored the order of the Court to answer interrogatories. When they did finally answer (26 months after they were served) they were found to be "totally inadequate". Finally, when they appeared before the special master to defend their answers he found that their prosecution of the *White* case was "not serious". Accordingly, we submit, they were not adequate representatives of the nonparty stockholders of the Fund.

To permit *White's* glaring neglect of duty to be visited on absentee members of the class would clearly be unjust and a violation of the language and intent of Rule 23.

CONCLUSION

We submit defendants' petition for a writ of certiorari should be denied.

Dated: November 22, 1972.

Respectfully submitted,

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